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No. 86-203

In The
Supreme Court of the United States
October Term, 1986

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Petitioners,

vs.

JACK MOLDOVAN and JACK DRAPER, as Trustees for the TRI-STATE UFCW AND EMPLOYERS BENEFIT FUND,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF THE CASE

Petitioner The Great Atlantic & Pacific Tea Company, Inc. (hereinafter refered ~~to~~ as "A&P") and Local 590 were parties to a succession of labor agreements regarding certain of A&P's employees employed in A&P's Altoona Division. In June, 1980, negotiations began between Local 590 and A&P for a new contract to replace the 1977 agreement which was to expire in September, 1980. Negotiations continued throughout the summer of 1980, and the 1977 agreement was extended until a 24-paragraph Memorandum of Understanding was executed in October, 1980, by the negotiators for A&P and Local 590.

The Memorandum of Understanding provided that "all terms and conditions of the present agreement shall remain in effect except as hereafter modified." A&P has stipulated that the 1977 agreement, as modified by the Memorandum of Understanding, is the agreement it thought it had with Local 590 for the period from October, 1980 until September, 1983. One of the provisions of the 1977 agreement which remained unchanged was the requirement of contributions to the Tri-State UFCW and Employers Benefit Fund (hereinafter "Fund"), including continued contributions for three months for employees who were laid off. This case is a dispute between the Fund and A&P as to whether A&P owes three months' contributions on behalf of employees who lost their jobs when A&P closed most of the stores in its Altoona Division.

Discovery disclosed that shortly after the Memorandum of Understanding was executed, representatives of A&P met with its store managers to explain to them the terms and conditions under which the employees would

be working. The store managers were given a copy of the Memorandum of Understanding and were told that the Memorandum of Understanding and the 1977 Agreement now constituted the contract with Local 590.

A&P immediately began to implement the terms of the 1977 Agreement as modified by the Memorandum of Understanding, including a provision of new severance benefits and a new "OPT-OUT" program, as well as new wage and fringe benefits. The OPT-OUT program was offered to all eligible employees from December 1, 1980 through February 28, 1981, at a cost of over $550,000. A&P made regular contributions on behalf of all employees to the Fund, and also made continuing contributions on behalf of laid off employees, including those employees who were severed and had no right of recall.

After the Memorandum of Understanding was executed, Local 590 and A&P appointed individuals to draft a consolidation of the Memorandum of Understanding and the 1977 Agreement. This apparently was accomplished prior to April, 1981, when A&P forwarded a typed Collective Bargaining Agreement to the Union for execution. The representatives of Local 590 executed the contract which had been forwarded to them by A&P and returned it to A&P for execution. After A&P received the contract executed by Local 590, it forwarded it to the Altoona Division, at which point A&P apparently became unhappy with provisions contained in the typed contract, which its own representatives had sent to the Union for execution. A&P subsequently refused to execute that document.

Even subsequent to that refusal, A&P indicated in internal memoranda and in communications to third parties,

including the Fund, that it had a Collective Bargaining Agreement with Local 590. It continued to make contributions to the Fund and, in fact, increased those contributions in accordance with a notice sent by the Fund. It even engaged in concession bargaining with Local 590 for the Altoona Division during the summer of 1982, seeking union approval to modify the terms of the Memorandum of Understanding.

In June, 1982, Local 590 and A&P voluntarily agreed to submit to an arbitrator the issue of the existence of a contract, an issue which A&P had raised as a defense to a grievance which had nothing to do with the Fund. The Fund was not notified of the arbitration, was not a party to the arbitration, and did not agree to be bound by the arbitrator's decision. Despite the relationship which had existed between A&P and Local 590 between October, 1980 and June, 1982, Arbitrator Duff ruled on January 5, 1983 that there was no existing collective bargaining agreement.

It is important to note that in June, 1982, when A&P placed before the arbitrator the issue of the existence of the contract, the Fund had no claims for delinquent contributions against A&P, which was paying regularly. In fact, even as of the second and third arbitration hearing dates which occurred in August and September, 1982, the Fund had no claim for contributions against A&P. Only the last hearing date of October 5, 1982 occurred after the closing of 40 stores which resulted in the Fund's claim against A&P for three months' continued contributions.

The Fund commenced an action on December 17, 1982, in Federal Court in order to enforce its rights against

A&P. The Fund's action *preceded* Arbitrator Duff's ruling that no contract existed between A&P and Local 590 after October, 1980.

SUMMARY OF ARGUMENT

The Court of Appeals correctly analyzed the principles of collateral estoppel in focusing on whether the Fund and Local 590 represent similar interests. In holding that the interests represented by Local 590 and the interest represented by the Trustees were not similar, the Third Circuit correctly interpreted and applied this Court's decisions in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984) and *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 105 S.Ct. 2833 (1985). In those cases, the Court has consistently upheld the independence of the Trustees *vis-a-vis* their roles as employer representatives or union representatives. A contrary decision by the Court of Appeals in the instant case would have severely undermined the independence of trustees of multiemployer funds by permitting a union to control the collection procedure by filing a grievance and proceeding to arbitration before a fund could obtain a judgment in federal court.

The decision by the Third Circuit is also consistent with this Court's decision and reasoning in *Barrentine v. Arkansas Best Freight System*, 450 U.S. 728 (1981) and *Alexander v. Gardner Denver*, 415 U.S. 36 (1974). Recently, the Court in *Central Transport, Inc., supra*, re-

ferred to *Barrentine* and reaffirmed the principle that certain individual rights of employees should not be limited to enforcement through the grievance and arbitration procedures in collective bargaining agreements.

The decision of the Court of Appeals only permits the Fund the opportunity to prove in district court that it is entitled to certain contributions. The decision in the instant case does not in any manner assign the Trustees a role in collective bargaining.

Nothing in the Trust Agreement compels a conclusion that the Trustees should be bound by the arbitration decision between A&P and Local 590.

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ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS PROPERLY APPLIED THE LEGAL PRINCIPLES RELATED TO COLLATERAL ESTOPPEL AND PROPERLY APPLIED THIS COURT'S PRIOR DECISIONS IN CENTRAL TRANSPORT, ROBBINS, AND AMAX.

The unusual factual basis of this case might be one of first impression; however, it might just as easily be a case of last impression. It is unlikely that any court will again face a factual situation where an employer and a union execute a 24-paragraph document which sets forth numerous terms and conditions and which continues in effect the prior agreement except as so modified, and where the employer then observes the terms of the documents which it executed for more than 20 months, but sub-

sequently denies the existence of a contract and manages to convince an arbitrator that no contract ever existed. This arbitrator-created vacuum left all parties, including the Fund as third-party beneficiary, in a highly-unusual posture. Nonetheless, the legal principles applicable to these facts are well settled.

This Court has consistently held that a litigant who has not appeared in a prior action may not be collaterally estopped if the litigant has not had an opportunity to present evidence and arguments on the claim. *The Blonder-Tung Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313 (1970). This is especially true where the purported representative in the prior case has interests that are not necessarily or even probably the same as those whom they are deemed to represent. *Hansberry v. Lee,* 311 U.S. 32 (1940).

The Court of Appeals in the instant case, citing *Amax* and *United Mine Workers Health & Retirement Funds v. Robinson,* 455 U.S. 562 (1982), ruled that there was an inherent conflict between the interests of employees of A&P who were members of Local 590, and the interests of the Fund beneficiaries represented by the Trustees. The Court of Appeals stressed the fact that only a portion of the Fund's participants and beneficiaries were A&P employees, and that the Trustees' fiduciary obligation extends to all beneficiaries, many of whom not only worked for other employers, but in some cases were represented by another union local.

Because of the conflict of interest inherent in the role and responsibilities of fund fiduciaries, as compared to the role and responsibilities of representatives of labor or

management, this Court has consistently held that bargaining representatives do not represent the same interests as trustees of benefit plans. *Amax, Robbins* and *Central Transport* compel the conclusion that there is in every instance involving a multiemployer benefit plan a conflict between the interest of the Fund and the interests of the members of a bargaining unit. This conflict is so fundamental that as a matter of due process, the union cannot be deemed the representative of the participants of the Fund.

Were it otherwise, the federal courts would become clogged with cases involving funds' efforts to enjoin arbitrations in order to protect their right, recognized by this Court, to litigate collection issues in federal court, or to protect themselves from harm if a union pursued in arbitration an objective which was contrary to the interest of the fund. This in turn would result in injunctions delaying resolution of arbitrable labor disputes, a result obviously inconsistent with the federal policy of efficient and speedy resolution of labor-management problems.

In this case, suit was filed by the Fund on December 17, 1982, before the decision of Arbitrator Duff was handed down in January, 1983. This timing demonstrates the Fund's desire to litigate the issue of delinquent contributions in the federal forum. It also demonstrates the absence of any intention to intervene in the arbitration process.

A&P has argued in its Petition for Writ of Certiorari that the Third Circuit's decision is inconsistent with the Court's "fact sensitive" rationale in Robbins. Even if A&P's interpretation of *Robbins* is correct that the intent of the parties to a collective bargaining agreement must

be reviewed in determining whether the Trustees are bound to arbitrate, there is no evidence in the instant Trust Agreement or in the collective bargaining agreement between Local 590 and A&P of any intent of the parties to require arbitration of disputes between Trustees and employers involving the collection of contributions. Furthermore, nowhere in the Trust Agreement is the authority to initiate legal proceedings to collect contributions conditioned on the exhaustion of any contractual remedies found in any of the collective bargaining agreements. A comparison of the provisions of the collective bargaining agreement and the trust agreements involved in *Robbins* and in the instant case does not disclose any significant differences which would result in a different conclusion involving the issue of whether the Trustees were bound to arbitrate the issue of the existence of the contract.

Indeed, as previously stated, the issue of whether a contract exists is not normally an arbitrable issue but is one for the courts to decide. That issue was not arbitrated in this case as a result of any provision of the collective bargaining agreement, but resulted from a separate agreement between the union and A&P to arbitrate that issue. The Fund was neither party to nor beneficiary of that separate agreement.

Because the Fund would not be required to arbitrate the issue under *Robbins*, A&P's discussion with respect to the "fact sensitive approach of *Robbins*" is irrelevant. In fact, A&P has recognized that the Trustees were not bound to arbitrate their collection action against A&P, in that A&P has contended that the Trustees had the opportunity to "prospectively disavow or otherwise interfere

with the arbitration proceedings". A&P's Petition for Writ of Certiorari, p. 13, n. 7. If so, such disavowal or interference would certainly be inconsistent with a requirement that the Trustees are bound to arbitrate the issue of the existence of a collective bargaining agreement. A&P has not moved to stay or dismiss the instant case pending arbitration but has argued that the Fund is bound by the decision of Arbitrator Duff. The Third Circuit correctly recognized that issue and correctly ruled that the interests of the parties were not sufficiently close to apply the doctrine of collateral estoppel against the Fund. A&P's efforts to focus on the identity of issues, i.e., is there a contract, should never be reached in that the identity of interests between the Trustees and representatives of Local 590 are so diverse.

A&P has also argued in its Petition for Writ of Certiorari that the Third Circuit's decision that the Fund is not barred by the Arbitrator's award is a threat to federal labor policy. Such an argument ignores this Court's holdings that a union's submission of an issue to arbitration does not necessarily bar the employee's right to litigate a similar issue under a federal statute. *See, Alexander, supra* (Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*) and *Barrentine, supra* (Fair Labor Standards Act, as amended, 29 U.S.C. § 201, *et seq.*).

This Court has set forth several reasons which justify such a result, and those reasons are equally applicable to Trustees' obligations under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, *et seq.*, as to employees' rights under Title VII and the Fair Labor Standards Act. First, the Trustees' statutory

right might not be adequately protected because the "specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land." *Barrentine,* 450 U.S. at 743.

Second, the arbitrator may be powerless to grant to the Trustees as broad a range of relief as the federal statute in question. For example, ERISA permits recovery of liquidated damages, reasonable attorneys' fees, interest and costs, which are normally not recovered in arbitration.

Third, "[t]he record of the arbitration proceeding is not as complete (as in a judicial proceeding); the usual rules of evidence do not apply; and rights and procedures common to civil trial, such as discovery, compulsory process, cross-examination, and testimony under oath are often severely limited or unavailable." *Alexander,* 415 U.S. at 57-58.

In view of the independent fiduciary obligations of fund trustees, codified in ERISA and enunciated by this Court, the right of trustees to enforce in federal court the collection of contributions under the remedies in ERISA is entitled to comparable independence from the arbitration process. The rationale of the Third Circuit is absolutely consistent with *Alexander* and with *Barrantine* and would not undermine the doctrine of federal labor law favoring arbitration of disputes between employers and unions.

II. THE COURT OF APPEALS' DECISION DOES NOT IMPROPERLY ASSIGN THE TRUSTEES A ROLE IN THE COLLECTIVE BARGAINING PROCESS.

Nothing in the Third Circuit's decision permits the Trustees to participate in collective bargaining negotiations. The decision of the Third Circuit deals only with the issue of collateral estoppel and in no way sanctions or compels Trustee participation in collective bargaining negotiations.

The Third Circuit's decision permits the Trustees the opportunity to prove the existence of a collective bargaining agreement and obligations thereunder, but does not provide the Trustees the opportunity to create a collective bargaining agreement or to dictate obligations.

This Court in *Robbins* acknowledged trustees' rights to obtain a judicial determination of whether contributions are due. This will necessarily involve fund trustees asserting interpretations of the collective bargaining agreement which compel contributions from the employers. The third Circuit's decision in the instant case does not thrust the Trustees into the negotiating process for collective bargaining any more than did the Court's decision in *Robbins*. The Trustees, if they can prove a contract, will simply seek to enforce their rights as representatives of third-party beneficiaries.

III. NOTHING IN THE TRUST AGREEMENT BINDS THE FUND TO ARBITRATION DECISIONS BETWEEN A&P AND THE UNION.

A&P cites several sections of the Fund's Trust Agreement which refer to the terms "collective bargaining

agreement''. None of the sections cited by A&P in its Petition for Writ of Certiorari compels the conclusion that the Fund is bound by an arbitration between A&P and the Union involving the collective bargaining agreement. Furthermore, none of the sections cited by A&P requires that the determination of whether there is a collective bargaining agreement be made in an arbitration proceeding between the employer and the Union. Indeed, the Trust Agreement provides that the Trustees are given the power to construe provisions of the Trust Agreement.

CONCLUSION

For the reasons stated above, A&P's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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